No. 143

In the Supreme Court of the United States

OCTOBER TERM, 1948

ALVIN KRULEWITCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 857-867) is reported at 167 F. 2d 943.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 11, 1948 (R. 868). On June 9, 1948, by order of Mr. Justice Jackson, the time for filing a petition for a writ of certiorari was ex-

tended to July 10, 1948 (R. 869). The petition for a writ of certiorari was filed July 9, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting evidence which allegedly resulted from leads obtained in an illegal search on the prosecutor's assurance that the evidence was procured independently of the search.

2. Whether, in the circumstances of this case, it was prejudicial error for the trial court not to require the prosecution's chief witness, the woman alleged to have been transported for immoral purposes, to disclose on cross-examination where she was living at the time of the trial.

3. Whether statements of a codefendant not on trial, made subsequent to the interstate journey alleged in the indictment, but designed to conceal petitioner's complicity in the conspiracy charged, were properly admitted in evidence against him as declarations of a co-conspirator in furtherance of the conspiracy.

4. Whether a government witness was properly permitted to testify concerning his "understanding" based on petitioner's actual words, which the witness could not recall *verbatim*.

5. Whether it was error to exclude testimony that petitioner once reported to the police an unsuccessful attempt at extortion on the part of the chief prosecution witness, where she had already admitted the extortion attempt.

6. Whether the trial court erred in permitting the jury to convict if they found the transportation in issue to have been for the purpose of debauchery or other immoral purposes as well as commercial prostitution.

7. Whether it was error to refuse to instruct the jury that the testimony of the woman alleged to have been transported for immoral purposes should be considered with great caution and closely scrutinized.

8. Whether the trial judge erred in answering with a simple affirmative an inquiry by the jury as to whether they might recommend leniency.

9. Whether petitioner's motion for a remand of the cause, then pending on appeal, for the purpose of enabling the trial court to pass on a motion for a new trial on the ground of alleged newly discovered evidence was properly disposed of.

STATEMENT

Count 1 of a three-count indictment (R. 11-16), filed January 4, 1943 (R. 3), in the District Court for the Southern District of New York, charged that on or about October 20, 1941, petitioner and

one Rose Sookerman,[1] a codefendant, induced and enticed one Elizabeth Johnston[2] to travel in interstate commerce from New York City to Miami, Florida, for the purpose of prostitution and debauchery and for other immoral purposes, in violation of Section 3 of the Mann Act (18 U.S.C. 399). Count 2 charged the same defendants with causing the aforesaid transportation, in violation of Section 2 of the Mann Act (18 U.S.C. 398). The third count charged conspiracy to commit the substantive offenses. Following a trial by jury, petitioner was found guilty on all counts (R. 762).[3] He was sentenced to imprisonment for two years on the first count, and on the other two counts the imposition of sentence was suspended and he was placed on probation for two years to take effect at the expiration of the sentence on count 1 (R. 767). On appeal the judgment of conviction was affirmed (R. 868).

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[1] Variously referred to in the record as Pauline Hillson, Betty Lewis, Betty Gordon (R. 49), and Mrs. Rose Kay (R. 715).

[2] Variously referred to in the record as Elizabeth Sorrentino, Joyce Winters, and Joyce Winston (R. 47).

[3] This was the fourth time that petitioner had been brought to trial. His first trial, at which his codefendant was jointly prosecuted, resulted in a disagreement of the jury (R. 2). In his second trial, he and his codefendant were found guilty by a jury on all counts, and he received prison sentences aggregating 3 years and six months on counts 1 and 3 and a suspended sentence on count 2, but on appeal by petitioner alone his conviction was reversed by a divided court and a new trial granted because of trial errors (R. 2; see *United States* v. *Krulewitch*, 145 F. 2d 76). His third trial ended in a mistrial (R. 2).

Since petitioner does not question the sufficiency of the evidence to support the verdict, it will suffice to summarize it very briefly. Petitioner met Elizabeth Johnston, whom he knew to be a prostitute (R. 324), in June of 1939 (R. 51), promptly placed her in a brothel in New York City with the codefendant Sookerman, and thereafter took her earnings (R. 51-52). After a week or so, he attempted to place her in a brothel in Chicago (R. 51, 52, 54, 56), but she was unwilling to remain there and both returned to New York City, where she continued to "work" for him (R. 54-64). In addition to working as a prostitute for him she frequently lived with him as his mistress (R. 163-166). In October of 1941, he determined to have her ply her trade in Florida and rented the El Chico Hotel in Miami for the proposed brothel (R. 72, 237; Gov. Ex. 7, R. 207, 826). On October 21, 1941, in company with Sookerman, they left New York City for Miami by train (R. 72-74; Gov. Ex. 17, R. 366, 830). Shortly after their arrival, Johnston commenced to engage in prostitution (R. 76) and turned her earnings over to petitioner (R. 77-78).

ARGUMENT

1. At the trial, after a hearing held in the absence of the jury, the court suppressed all evidence which had been obtained as a result of a search of petitioner's residence (R. 224-225). From time to time thereafter petitionr objected to the reception of certain items of the Government's evidence on

the ground that they were not obtained independently of the illegal search (R. 226, 340, 391). On the prosecutor's assurance in each instance that the challenged evidence had been independently obtained, the court permitted the evidence to be received (R. 227, 341-342, 391-393). Petitioner contends that this was error and that each time the defense challenged an item of evidence on the ground that the Government's possession of it resulted from the illegal search the court was bound to interrupt the trial for the purpose of holding a hearing on the issue (Pet. 17-21). The contention is, we submit, without merit.

In *Nardone* v. *United States*, 308 U. S. 338, 341, this Court stated that once a defendant has established that evidence has been illegally procured, "the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." The Court, however, also pointed out that, because of the necessity of expedition in criminal trials, "tenuous claims" were not sufficient to "justify the trial court's indulgence of inquiry into the legitimacy" of the challenged evidence, and that "claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity." *Id.*, at pp. 341-342. "The civilized conduct of criminal trials," the Court continued, "nec-

essarily demands the authority of limited discretion entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges." *Id.*, at p. 342.

In the case at bar petitioner's first objection to allegedly tainted evidence set the pattern for the procedure which was followed and which apparently was wholly satisfactory to him then. He merely stated his belief that proposed evidence was a "fruit of [the] illegal search." The prosecutor, in reply, advised the court that the proposed evidence had been independently obtained. The court then asked the prosecutor whether he wished "to assure me that the evidence which you are about to introduce is not the fruit of the illegal search." The prosecutor answered in the affirmative, and, following an off-the-record discussion, proceeded to explain the independent origin of the evidence. He was interrupted, however, by the judge, who said, "Well, it is not necessary to argue the matter * * * any longer. On your assurance that the testimony which you are about to introduce is not the fruit of the illegal search, I will receive the evidence." (R. 226-227.) Petitioner registered no further objection to the reception of the evidence in question. He thus accepted the prosecutor's as-

surance and did not demand sworn proof of the independent origin of the evidence.

With the pattern thus set, the court handled a second objection of the same character in the same way, petitioner again registering no objection after his initial suggestion that the proposed evidence was tainted (R. 340-342). A third objection of like character was similarly disposed of (R. 391-393).[4]

It is obvious, we think, that in each instance petitioner's initial suggestion that the proposed evidence was a "fruit of the poisonous tree" and not independently obtained by the Government was entirely speculative. Under the rule of the *Nardone* case, *supra*, therefore, the trial judge appro-

[4] Petitioner misleadingly intimates that the prosecutor was unable to produce proof, after an offer to do so, that the evidence involved in this third objection was independently procured (Pet. 12). The pertinent facts are as follows: The challenged evidence was the testimony of one Levenson, a Baltimore furniture dealer, that on October 21, 1941, petitioner called on him in Baltimore and "said that he wanted to buy some furniture for some hotel in Florida," which furniture he proceeded to buy (R. 394). When this witness was called, petitioner objected that the identity and testimony of this witness were based on information contained in papers found in the illegal search (R. 391). The prosecutor assured the court, however, that the Government's lead in respect of this witness was obtained from interrogation of the codefendant Rose Sookerman, and not from papers taken in the search (R. 391-392). Though the court accepted this assurance (R. 391-392), petitioner nevertheless stated that he thought the prosecutor should be compelled to produce the Sookerman statement in question (R. 393). The prosecutor then stated that while he did not have Sookerman's "original statement," he did have "the statement as set forth in an FBI arrest report" (R. 393). Though the judge said it would not be necessary for him to produce the FBI report mentioned (R. 395), the prosecutor subsequently did produce it, and offered to read it into the record (R. 410-411).

priately exercised his discretion in admitting the evidence after receiving the prosecutor's assurance that the evidence had an independent origin."

2. Elizabeth Johnston (or Elizabeth Sorrentino, her married name, by which she was most often referred to in this petitioner's fourth trial), the woman petitioner was accused of illegally transporting, was the Government's chief witness. The first question asked her on cross-examination was where she was then living. She replied that she did not "care to disclose that," and a direct answer was not then demanded by petitioner's counsel. She admitted, however, in response to further questioning, that she was not living with her husband, Mr. Sorrentino, and that she was then, and had been for the preceding eleven months, living with "some man." (R. 121-122.) Considerably later in the trial, after she had been excused to permit other witnesses to testify and then been recalled and cross-examined at some length, the following occurred (R. 307-308):

> Q. Where do you live now, Mrs. Sorrentino?
>
> Mr. Hilly: Objected to, if your Honor please.
>
> A. I wouldn't say because he would be up there bothering me.
>
> The Court: That question was asked the other day and she said she would prefer not to state it.

Mr. Hilly: If Mr. Todarelli wants the address I will give it to him, but I am not going to put it on the record. I do not think it is material on the record, if your Honor pleases.

Mr. Todarelli: I think we are entitled to know that, your Honor.

The Court: In my discretion I will exclude the question.

The Witness: Thank you.

Mr. Todarelli: Very well, sir. * * *

Petitioner contends, relying on *Alford* v. *United States*, 282 U. S. 687, that the court's ruling, permitting the witness to decline to state her address, was prejudicial error because he was thereby prevented from disclosing to the jury her environmental background for impeachment purposes (Pet. 22-24). We submit that the *Alford* case is clearly distinguishable from the case at bar, and that the court's ruling was an appropriate exercise of discretion.

In the *Alford* case, a mail-fraud prosecution, a former employee of the defendant, testifying for the Government, gave damaging testimony against the defendant on direct examination. On cross-examination, questions seeking to elicit the witness's place of residence were excluded on the Government's objection that they were immaterial and not proper cross-examination. Counsel for the defense insisted that the questions were proper cross-examination and that the jury were entitled to know "who the witness is, where he lives and what his

business is." Later, the jury having been excused, defense counsel urged, as an additional ground for asking the excluded questions, that he had been informed that the witness was then in the custody of the Federal authorities, and that such fact might be brought out on cross-examination "for the purpose of showing whatever bias or prejudice he may have." The court, however, adhered to its previous rulings. This Court held the exclusion of the attempted line of inquiry to be, under the circumstances, prejudicial error, because it prevented the defendant from "identifying the witness with his environment, to which cross-examination may always be directed" (282 U. S., at p. 693), and because it invaded the defendant's right to seek to discredit the witness against him.

The present case is entirely different from the *Alford* case. As pointed out by the Circuit Court of Appeals (R. 861), "the witness's environment had already been brought out on direct, as well as cross-examination. It had already been shown that she had been a prostitute since her teens [see R. 47-48, 132, 135]. She had admitted on cross-examination that she was living at the time of the trial in an illicit relationship and had been doing so for about eleven months [see R. 121-122]. She had readily stated that she had previously lied about this very case in a sworn statement to an F.B.I. agent [see R. 195]. She had conceded that she had attempted to blackmail the appellant [see R. 283-285] and that she had been arrested upon several

occasions and spent time in at least three reformatories [see R. 47, 134, 288]. Under these circumstances, it can hardly be said here, as it was in the *Alford case* [282 U. S., at p. 694] that 'The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable crossexamination'."

In view of the fact that the Johnston woman's character, her capacity for lying under oath, and her hostility to petitioner had all been brought to the jury's attention, petitioner clearly suffered no prejudice in not being permitted to elicit the precise address at which she was then living or the name of the other party to her latest illicit liaison. And the ready acquiescence of petitioner's trial counsel in the judge's ruling, as evidenced by the above-quoted excerpt from the record (*supra*, pp. 9-10), is indicative of the fact that he did not consider the ruling prejudicial.

Moreover, as the Circuit Court of Appeals further observed (R. 861-862), "the witness [Johnston] was the same one characterized in our former opinion [*United States* v. *Krulewitch*, 145 F. 2d 76, 78] as 'an unruly and extremely unstable person' and her actions at this trial disclosed by the record show as before that the judge 'was faced with a hysterica woman, probably never well balanced emotionally, and in any event enervated by a life from girlhood of carousing and debauch.' And the court had the duty to protect her, as the *Alford* case states [282 U. S. at p. 694], 'from questions

which go beyond the bounds of proper crossexamination merely to harass, annoy or humiliate her. It could well have been thought that, if she were forced to disclose in open court the name of the man with whom she was living and their address, it was likely that she would thereby become even less controllable and thus would make it even more difficult to arrive at the truth. When the information sought from her was offered the defense, we think it became a matter of discretion whether she should be forced to supply it, and that discretion we believe to have been exercised wisely under the circumstances."

3. The Johnston woman testified that early in December 1941 she left Miami and returned to New York, where she was arrested in connection with this case; that following her arrest she was taken to Rochester, New York, where she stayed a week; and that during this period Rose Sookerman, petitioner's codefendant, came to her and advised her not to "talk" until she had consulted a lawyer, adding that "It would be better for us two girls to take the blame than Kay [an alias of petitioner] because he couldn't stand it, he couldn't stand to take it" (R. 109-112). The witness's testimony of these statements of Rose Sookerman was objected to by petitioner on the ground that the conspiracy to transport charged in the third count had ended the "minute that that transportation was at an end," so that the rule that acts and declarations of one

conspirator in furtherance of the conspiracy are admissible against co-conspirators had no application (R. 110-111). Petitioner contends that the trial judge's overruling of his objection was erroneous (Pet. 24-26).

Petitioner's assumption that the conspiracy charged terminated immediately upon completion of the interstate transportation which was the alleged object of the conspiracy is, we submit, unrealistic. Cf. *Low Moy* v. *United States*, 237 Fed. 50, 52 (C.C.A. 8). Implicit in a conspiracy to violate the law, as the Circuit Court of Appeals pointed out (R. 862-863), "is an agreement among the conspirators to conceal the violation after as well as before the illegal plan is consummated. Thus the conspiracy continues at least for purposes of concealment, even after its primary aims have been accomplished." Sookerman's statements to Johnston which petitioner objected to were clearly designed to conceal petitioner's participation in the conspiracy. They were admissible against him, therefore, under the familiar rule of evidence in conspiracy cases above referred to. *United States* v. *Goldstein*, 135 F. 2d 359, 361 (C.C.A. 2); cf. *Murray* v. *United States*, 10 F. 2d 409, 411 (C.C.A. 7), certiorari denied, 271 U. S. 673.[5]

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[5] In *Fiswick* v. *United States*, 329 U. S. 211, relied on by petitioner (Pet. 25), the trial court had admitted as against all of several alleged co-conspirators certain damaging admissions made by each to agents of the Federal Bureau of Investigation following their apprehension. This was held error, the Court observing that "confession or admission by one co-conspirator

4. Arthur Peacock, a government witness, who ran a bicycle shop on the ground floor of the building in which the El Chico Hotel was located, testified that petitioner inquired of him, some time before the transportation charged in the indictment, if he could "lease the upstairs." Peacock told petitioner that he had nothing to do with the "upstairs" and advised petitioner where the owner of the building could be found. (R. 235-236.) Asked if he had any further conversation with petitioner, the witness replied that he tried to "find out what was going on upstairs," and asked petitioner some questions. Asked if petitioner "made answers to those questions," the witness testified that "He made some sort of an answer; it has been so long ago that I can't remember exactly what it was. Seemingly there was something said that he led me to believe that they weren't going to sell merchandise or something upstairs, they were going to operate." The witness was then asked whether, as a result of his talk with petitioner, he had "any understanding as to what the place was going to be used as." Objection was made on the ground that the answer called for a "conclusion" of the witness, but the answer was allowed and was, "In accordance with my belief at that time the gentleman led me to be-

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after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it" (329 U. S. at p. 217). The distinction between this case and the *Eisurick* case, therefore, is clear, since the Sookerman statements to Johnston, far from being admissions to a government agent, were plainly calculated to conceal the existence of the conspiracy from the prosecuting authorities.

lieve that there was going to be the same as had been operated there sometime before a house of prostitution." (R. 237.) A motion for mistrial was at once made and the court, before ruling upon it, asked the witness whether the understanding he had just stated was the result of something petitioner had said to him. The witness answered that it was and added that if he had "been asked that same question in the first trial, * * * I would have very likely been able to answer it," but that he could not then recall petitioner's "exact words." (R. 238-239.) The motion for a mistrial was then denied (R. 239). Petitioner contends that this ruling was erroneous (Pet. 26-30).

We submit that the court's ruling was plainly correct. It is clear from the above account that the witness was not merely stating a general impression gained from a conversation but not based on specific language used. Rather, he was testifying to the substance of what petitioner had said to him, passage of time having dimmed his memory as to the "exact words" petitioner had used. This, of course, is a common and obviously legitimate manner of reproducing a conversation. As the Circuit Court of Appeals correctly observed (R. 864), "Here the witness, as commonly occurs, was trying in vain to reproduce the identical language used in a conversation he had had so long before that his memory was unequal to the task. * * * He * * * was permitted to give his understanding of what was said to him—in effect the substance of

what was said. The evidence was the best that the circumstances permitted and was properly put before the jury for whatever it was worth."

5. Petitioner offered to prove, through a police officer, that he once complained to the police that Elizabeth Johnston had tried to extort money from him after she had returned to New York from Florida and they had become estranged (R. 504-505). Petitioner's counsel stated that the purpose of the testimony was to "show that when the defendant refused to give her the money her mind became inflamed and embittered, and it is on the question of her bias and prejudice and motive for testifying falsely in this case" (R. 505). On objection of the Government, the trial court excluded the testimony (R. 505). Petitioner contends that the ruling was error (Pet. 30-31). Johnston, however, had already freely admitted her attempt to extort money from petitioner and his refusal to comply with her demand (R. 284-285). The exclusion of the police officer's testimony was proper, therefore, since it could only have confirmed what Johnston herself admitted. Petitioner now suggests, however, that the officer's testimony would not only have confirmed the unsuccessful blackmail attempt, but would also have shown an additional ground of bias against petitioner on Johnston's part, *viz.*, her resentment at his reporting the incident to the police (Pet. 31). The argument does not avail petitioner, however, since there was no

proof or offer of proof that Johnston ever heard of petitioner's reporting the matter.

6. The trial court repeatedly instructed the jury, in the language of the indictment and the statute, that in order to convict, they would have to find that the transportation in issue was "for the purpose of prostitution, debauchery, or other immoral purposes" (R. 748 *et seq.*). Petitioner contends that the jury should have been instructed that they could not convict unless they found the purpose of the transportation to have been commercial prostitution (Pet. 31-35). The contention is plainly without merit, since transportation for the purpose of non-commercial immorality is as much forbidden by the Mann Act as transportation for prostitution purposes, *Caminetti* v. *United States*, 242 U. S. 470, and, as pointed out by the Circuit Court of Appeals (R. 865), there was ample evidence from which the jury might have found that the transportation in issue had the dual purpose of commercial prostitution and concubinage. Indeed, petitioner admits that "The record is replete with evidence, and * * * it is undisputed that there was an illicit relationship between defendant and the complaining witness * * * " (Pet. 33).

True, the court, at one point in its charge, inadvertently defined prostitution too broadly as "the practice of sexual intercourse between a man and a woman outside of the marital relationship" (R. 748), and petitioner now complains of the faulty definition (Pet. 32).

But, as observed by the court below (R. 865), petitioner's objection to the charge "was not based upon any faulty definition of terms, which would doubtless have been corrected had it been called to the court's attention * * *." Rather, his objection was aimed at the whole theory that he could be convicted if his purpose in transporting the woman involved was found to be merely for purposes of personal immorality (R. 760-761), and this, as we have shown, was not well taken.

7. Petitioner contends that the trial court erred in refusing to give four requested instructions to the effect that the testimony of the Johnston woman must be considered by them with caution and closely scrutinized and that "unless the jury are convinced beyond a reasonable doubt of the truth of her testimony, the defendant should be acquitted" (Pet. 35-38). It is evident that the requested instructions (Nos. 15-18, R. 740-741) would have made the question of petitioner's guilt depend solely on whether or not the jury believed this witness. Her credibility, however, was not the sole issue in the case, as petitioner contends (Pet. 38), for her testimony was corroborated in every important particular. Petitioner admitted sending her to the El Chico Hotel in Florida on October 21, 1941 (R. 550, 553). Her crucial testimony as to the purpose of the trip (R. 72) was corroborated by independent testimony that on a previous visit to Miami petitioner had rented the El Chico for use as a

brothel (R. 236-237) and by documentary evidence showing that petitioner had sought to conceal his connection with the enterprise by renting the hotel in another's name (Gov. Ex. 7, R. 207, 826). Her testimony that the establishment was used for the purpose of prostitution was likewise corroborated (R. 239-240, 266). And her important testimony that she had previously fabricated evidence at petitioner's request (R. 118-121) was corroborated by proof that another witness had similarly fabricated evidence at his request (R. 343-345).

The fact that Johnston's testimony was fully corroborated in all material respects distinguishes *Speiller* v. *United States*, 31 F. 2d 682, 683 (C.C.A. 3), holding that it was error not to instruct the jury that they should carefully scrutinize and consider with greatest caution the testimony of the woman allegedly transported in a Mann Act case, she being the sole Government's witness and a woman "without morals" and showing "a reckless disregard of the truth." And in *Caminetti* v. *United States*, 242 U. S. 470, 495, it was held not reversible error to refuse an instruction that "the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case."[6]

[6] The trial judge in the instant case did, of course, give the usual charge that the credibility of witnesses and the weight to be given their testimony were matters entirely for their determination, including the instruction that, in weighing testi-

8. After the jury had retired to consider their verdict, they sent a note to the judge asking if they might recommend leniency. The judge read the note to counsel and stated that he intended to answer it "yes." Later, the jury returned a verdict of guilty with a recommendation of leniency. (R. 761-762.) Though no objection was made at the time of the incident, nor, indeed, thereafter, prior to appeal, petitioner contends that the judge's communication with the jury without recalling them to the courtroom and his answering their question with a bare affirmative without explaining that he would not be bound by any recommendation was such plain and prejudicial error that reversal of the conviction is justified notwithstanding the failure to object (see Rule 52(b), F. R. Crim. P.) (Pet. 39-41).

The contention is clearly without merit. This informal way of replying to the jury's question was at most a harmless irregularity. *Dodge v. United States*, 258 Fed. 300, 305 (C.C.A. 2), certiorari denied, 250 U. S. 660. Since defense counsel was present when the incident occurred and had ample opportunity to object to the giving of the

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mony, they could consider "the appearance of the witnesses on the stand, their candor or lack of candor, their feelings or bias, if any, their interest in the result of the trial, if any, and also their opportunity for observation, their means of information, and the reasonableness of the stories which they tell" (R. 745). As observed by the court below (R. 866), "this jury had ample warning that the witness [Johnston] was ill disposed toward the appellant and there was no reversible error in failing to add to the usual instructions as to credibility special ones in the requested language."

instruction, petitioner is in no position to complain now either of the nature of the instruction or the manner of its delivery. *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 81. See also *State* v. *Gill*, 14 S. C. 410, 414-416, a capital case, in which the jury asked the identical question asked here and were answered, as here, by a bare affirmative. Since the jury were plainly told in the main charge that petitioner's sentence, if he was found guilty, was the concern of the court, not theirs (R. 760), it is not to be presumed that they might have thought their recommendation would bind the court, or, as petitioner suggests (Pet. 40-41), that the verdict reached was the result of a compromise.[7]

9. Petitioner's last contention (Pet. 41-48) necessitates a somewhat detailed statement of the circumstances on which it is based:

The verdict of guilty was returned on April 25, 1947, and notice of appeal was filed on April 30, 1947 (R. 10). On or about August 26, 1947, pending the appeal, petitioner filed in the Circuit Court of Appeals a motion to remand the cause to the trial court in order that the trial court might pass on a motion for a new trial on the ground of newly

[7] It may be noted, *passim*, that the fact that petitioner was sentenced in the instant trial to but two years' imprisonment, whereas he received a sentence of three years and six months following his initial conviction without recommendation, which was reversed on appeal (see p. 4, *supra*, and in fn. 3), indicates that the court gave considerable weight to the jury's recommendation of leniency (see R. 765).

discovered evidence (R. 768-775).[5] The alleged grounds on which the motion for a new trial were based were (1) that Kathryn Swift, the forelady of the jury, fraudulently concealed at the *voir dire* examination that she had been an employee of the Government, and (2) that Joseph Lore, a bailiff in charge of the jury, neglected to report to the trial court a request received from the jury during their deliberations that they receive further instructions, and undertook to answer their query himself (R. 769-770, 772-775). Attached to the motion was an affidavit of Lore stating that during the course of the jury's deliberations the jury informed him that they desired further instructions from the court "as to bringing in a divided verdict"; that he told them that "they must bring in a unanimous verdict one way or the other"; and that he did not report the request to the court (R. 776).

The Government filed a memorandum in opposition to the motion (R. 777-782), to which were attached (1) a subsequently executed affidavit of Lore in which he entirely repudiated the statements made in his earlier affidavit, explaining that he had perjured himself in the earlier affidavit at petitioner's request and on the latter's promise to

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[5] According to the motion, "A similar motion for this relief was made on or about July 7, 1947, and heard on August 5, 1947, by District Judge Porterie who denied the relief solely on the ground that 'Since there is an appeal pending in the Circuit Court of Appeals the Court is without jurisdiction'" (R. 775).

"take care" of him (R. 783-786); (2) an affidavit of the forelady of the jury, stating that she definitely recalled that she was never asked on *voir dire* whether she had ever worked for the Government, that if she had been asked that question she would have had no hesitation about disclosing the fact that she had been a government employee in the past, and that the contents of the bailiff's (first) affidavit were entirely untrue (R. 787-789); (3) a letter from the trial judge to the United States Attorney, stating that he had "no recollection at all that Mrs. Swift * * * was asked whether or not she had ever been employed by the United States Government," and that "Mrs. Swift struck me as being a highly competent and honorable person, and I am sure that if she was asked whether or not she had ever been employed by the Government, she would have answered truthfully" (R. 792); and (4) an affidavit of a deputy clerk of court, stating that to the best of his recollection Mrs. Swift was not asked any questions regarding past employment by the Government (R. 793-794).

On October 10, 1947, the Circuit Court of Appeals disposed of the motion for remand as follows: "Motion denied, but if Leamy, J. [the trial judge], after hearing and consideration sees fit to request that the cause be remanded to him, such a request will be granted. However, this applies only to the point of the supposed communication of the bailiff with the jury" (R. 795).

Thereafter, following an extensive hearing before the trial judge (R. 800-821), at which counsel for petitioner and for the Government were heard; but at which no witnesses were called, the trial judge entered an order that "no request for remand be made herein" (R. 822-823).

Petitioner contends that the Circuit Court of Appeals erred in limiting Judge Leamy to a consideration of the alleged unlawful communication between the bailiff and the jury in determining whether or not to ask for a remand of the cause, and, further, that Judge Leamy erred in not calling for a full-dress hearing, at which the testimony of witnesses could be adduced, in deciding whether or not to ask for a remand in respect of that limited issue (Pet. 41-48). Pretermitting the question of whether the motion for a new trial, for the determination of which remand was sought, presented "newly discovered evidence" within the meaning of Rule 33, F. R. Crim. P., requiring that a motion for a new trial on any ground other than newly discovered evidence be made within five days after verdict, we submit that petitioner's contentions are clearly lacking in merit.

(a) Assuming, *arguendo*, that concealment by a juror on *voir dire* examination of his or her past Federal employment would justify or require the granting of a new trial, the Circuit Court of Appeals was clearly within the bounds of sound discretion in excluding this aspect of petitioner's alle-

gations from consideration by Judge Leamy. For, as against petitioner's unsupported claim that the forelady of the jury had concealed her past employment as alleged, were the categorical denial of the juror in question that she was ever questioned on *voir dire* as to her employment by the Government and her avowal that she would have had no motive whatever in concealing such employment if she had been asked about it. Her statements were corroborated, moreover, by the statement of the trial judge and the affidavit of the deputy clerk of court to which we have referred. Furthermore, petitioner pointed to nothing which would suggest a motive for the alleged concealment. Under the circumstances, therefore, the Circuit Court of Appeals was entirely justified in finding the allegation too tenuous and improbable to warrant its further consideration, with the resultant delay in an already unduly protracted prosecution (see fn. 3, *supra*, p. 4) which such further consideration would entail.

(b) As to the claim that it was incumbent upon Judge Leamy, under the terms of the circuit court of appeals' order of October 10, 1947, to hold a full hearing in respect of the alleged communication between the bailiff and jury, including the adduction of testimony, in determining whether to request a remand of the cause for the purpose of disposing of the motion for a new trial on that ground, it may be pointed out, in the first place,

that the circuit court of appeals, which issued the order, did not so construe it, as evidenced by its approval of Judge Leamy's refusal to order such a hearing (R. 867). Further, it is clear from the terms of the circuit court of appeals' order that it did not contemplate that a hearing in which witnesses would be called was necessarily required. On the contrary, it is manifest that the appellate court left it entirely up to Judge Leamy's discretion as to the method of determining whether a remand was called for. Finally, in view of the second affidavit of Lore, the bailiff involved, which entirely repudiated his original affidavit and explained his original perjury as having been suborned by petitioner, the whole basis of petitioner's motion was destroyed. And Judge Leamy was fully justified in accepting Lore's second affidavit as the truth and his first affidavit as perjured, first, because of the sworn statement of Mrs. Swift corroborating the truth of Lore's second affidavit, and secondly, because of petitioner's record as a suborner of perjury, as established at the trial (see R. 343-345, and cf. R. 118-121).[9]

[9] It may be added that Assistant United States Attorney Block, who represented the Government at the hearing before Judge Leamy, stated in a sworn affidavit that he had made a personal investigation into the truth of petitioner's charges in this respect, questioning all the jurors and also a Mrs. Mahoney, who, with Lore, was in charge of the jury during their deliberations, and that he was convinced as a result of his investigation that petitioner's charges were false (R. 798-799; see also R. 808-810).

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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